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No. 72-1598

IN THE

Supreme Court of the United States

October Term, 1972

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

BELL AEROSPACE COMPANY DIVISION
OF TEXTRON INC.,
Respondent.

BRIEF FOR RESPONDENT

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BELL AEROSPACE COMPANY DIVISION
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Respondent.

BRIEF FOR RESPONDENT

Statement of the Case

The National Labor Relations Board seeks reversal of the Second Circuit's holding that managerial employees are not covered by the Labor Management Relations Act. *Bell Aerospace Company Division of Textron Inc. vs. NLRB,* 475 F.2d 485 (CA2, 1973) at pp. 494-495. The NLRB further contends that the Second Circuit erred in holding that the appropriate manner for determining whether buyers like those at Bell are or are not managerial employees is by rule making in accordance with the Administrative Procedure Act, 5 USC Section 553. *Ibid.,* pp. 495-497.

Implicit in the NLRB's position on appeal is its recognition that Bell's buyers are managerial employees as that term has classically been construed in like cases by the Courts and the Board itself. A review of the record in the underlying representation proceeding will support no other conclusion.

Each buyer at Bell has unbridled authority to commit up to $5,000.00 of Company funds in any transaction (A 30, 31, 32, 43, 44, 48, Empl. Exh. 8 at A 33, 205). During a single 19-month period, one Senior Buyer, Mr. Charles Hopkins, committed the Company's credit in a total amount in excess of $1,350,000.00 on his own authority (A 34, Empl. Exh. 9 at A 34, 207). During the same period, the buyers as a group expended $7,671,172.00 of Company funds on purchases for which they required no further approval (A 34, Empl. Exh. 9 at A 34, 207).

Additionally, the buyers have full discretion, without any limit in dollar amount, in selecting prospective vendors (A 41, 48, 51, 161-163, 167-168), preparing invitations to bid (A 39-41, 51), evaluating bids which are submitted (A 41-43) and preparing purchase orders (A 44, 171-172, Empl. Exh. 18 at A 173). Buyers themselves execute all purchase orders up to $50,000.00 (A 30, Empl. Exh. 7 at A 33, 203). They are also fully responsible for negotiating price and terms regardless of the size of the purchase or the value of the subcontract (A 43, 48, 71-75, Empl. Exh. 11 at A 75, 210). In fact, in negotiating subcontracts worth millions of dollars, a buyer acts as chairman and chief spokesman for a Bell management team comprised of top managerial personnel representing various departments within the Company (A 44-45, 71-75, Empl. Exh. 11 at A 75, 210). In total, Bell's buyers were intimately involved in over 26,000 transactions which committed the Company to expenditures

in excess of $41,700,000.00 during a single 19 month period (Empl. Exh. 9 at A 34, 207).

Once agreement is reached, the buyer is responsible for seeing that contracts entered into are properly complied with and is continuously involved in fixing delivery dates and adjusting disputes between the supplier and Bell Aerospace Company (A 28-29, 72). As part of management, the buyer is always concerned with cost reduction (A 36, 70, 164-165, 167-168) and, on his own initiative, may change suppliers where a competitor of an established vendor shows that it can satisfy a requirement at a reduced cost (A 32, 161-163). In fulfilling these varied responsibilities, the buyers are the sole representatives of Bell Aerospace Company and, in their capacity as management representatives, are in constant communication with the vendor's highest levels of management, as well as the highest executives at Bell (A 44-45, 174, 175-178, Empl. Exh. Nos. 19, 20, 21, 22 and 23 at A 174-180, 221-233).

Notwithstanding this record, which discloses the buyers at Bell to be employing broad discretion in the exercise of a critical management function, the NLRB found Bell's buyers to constitute an appropriate unit for bargaining and directed an election. In its decision, the Board stated (Pet., App. D, p. 61):

> "In *North Arkansas Electric,* we found that, with the limitations there noted, 'managerial' employees are employees within the meaning of the Act and entitled to its protection . . . Therefore, even though, as the Employer argues, the buyers may be 'managerial' employees, we are of the view that as employees they are entitled to be represented under the Act, unless there is some cogent reason for denying such representation."

The Board felt there to be no cogent reason, "as the evidence before us fails to demonstrate that representation of the buyers would necessarily create a conflict of interest . . ."

Following election, the Board certified Amalgamated Local 1286, UAW, as collective bargaining representative of the buyers' unit. On the very day the Board's certification issued, August 12, 1971, the United States Court of Appeals for the Eighth Circuit rendered its decision in *NLRB vs. North Arkansas Electric Cooperative, Inc.*, 446 F. 2d 602 (CA8, 1971). In that decision, the Court refused to enforce an NLRB order directing that a managerial employee who had been discharged for union activities be reinstated. The Court found managerial employees to be without the coverage of the Act and, accordingly, not entitled to its protection.

Immediately upon being notified of the Eighth Circuit's decision in the *North Arkansas* case, the Company, on August 16, 1971, petitioned the Board to reconsider its decision and direction of election on the ground that the Board's determination that the buyers constituted an appropriate unit for collective bargaining purposes rested upon a decision which had been reversed by the Eighth Circuit Court of Appeals (A 278).

While its petition for reconsideration was pending before the Board, the Company declined to bargain with the Union. The Union filed a charge alleging that the Company's refusal to bargain constituted an unfair labor practice within the meaning of Sections 8(a)1 and 8(a)5 of the Labor Management Relations Act. By order dated May 1, 1972, the NLRB refused to abide by the decision of the Eighth Circuit in *NLRB vs. North Arkansas Electric Cooperative, Inc., supra*, and denied the employer's request

for reconsideration (Pet., App. E, p. 69). The Board, "with all due respect to the court" (Pet., App. E, p. 72), rejected the Eighth Circuit's interpretation of the Act's legislative history, an interpretation with which the Second Circuit has now concurred. The Board insisted that only those managerial employees "concerned with management policies in the labor relations area" (Pet., App. E, p. 73) were to be excluded from the coverage of the Act.

After denying the Company's petition for reconsideration, the NLRB, by decision and order dated May 30, 1972, found the Company to have violated Sections 8(a)1 and 8(a)5 of the LMRA (Pet., App. C, p. 47). The Second Circuit, agreeing with the Eighth Circuit's interpretation of the Act's legislative history, refused to enforce the Board's order directing the Company to bargain with the Union and the NLRB appealed to this Court.

Summary of Argument

The Respondent's position can be succinctly summarized. Managerial employees are not covered by the Labor Management Relations Act. The two Courts of Appeals which have specifically considered this question have carefully reviewed the legislative history of the Act and have come to identical conclusions. Their conclusion is consistent with the NLRB's own decisions in this area and has repeatedly been recognized by the courts.

Secondly, Bell's buyers are managerial employees and, accordingly, are without the coverage of the Act. In a line of decisions unbroken until the instant proceeding, the NLRB has uniformly found that buyers who exercise prerogatives of management in the manner and to the degree disclosed by this record are managerial employees. As managerial employees, such buyers have been excluded not

only from collective bargaining units of other employees, but from the coverage of the Act itself.

The Second Circuit's direction that the Board engage in rule-making prior to determining whether certain employees, including Bell's buyers, are or are not managerial employees is not only reasonable, but essential. The Second Circuit, while finding managerial employees to be outside the Act's coverage, did not preclude the Board from seeking to enact rules which would bring certain buyers, heretofore held to have been managerial employees, within the coverage of the Act.

That a rule-making procedure is required is evident. The Board, by decision in a single case, is seeking to broadly increase coverage under the LMRA. The Board would overturn more than a quarter of a century of precedent to the contrary and find buyers, such as those at Bell, to be "employees" within the meaning of the Act. In doing so, the Board would consider a new criteria, *i.e.* whether the buyers' position is "labor sensitive", and reject the rationale of numerous decisions which held, in effect, that buyers were a part of management.

The Board itself is unable to predict with any accuracy which employees might be included or excluded by virtue of its new "touchtone". It wishes to again undertake a case-by-case evaluation of this critical coverage question. In so doing, and by ignoring the rationale of its earlier decisions, the Board risks upsetting the fragile balance between labor and management which is the cornerstone of peaceful resolution of industrial disputes. A departure from precedent in such a fundamental area should not be undertaken on an *ad hoc* basis, without the careful consideration which the rule-making procedure would assure.

The already overcrowded calendars of the Courts and the NLRB itself hold little promise for either a prompt or an orderly redefinition of coverage under the Act. The law should remain undisturbed until the suggested expansion of coverage to a long excluded category of managerial employees, *i.e.* buyers, has been tested by the rule-making process.

ARGUMENT

POINT I

Managerial employees are not covered by the Labor Management Relations Act.

The National Labor Relations Board obstinately insists that managerial employees are covered by the Labor Management Relations Act notwithstanding the fact that two Circuit Courts have carefully considered and squarely rejected the Board's contention. Both the Second Circuit and the Eighth Circuit have painstakingly reviewed the legislative history of the Act in this regard and have concluded that managerial employees are not covered by the Labor Management Relations Act. *Bell Aerospace Company Division of Textron Inc. vs. NLRB*, 475 F. 2d 485 (CA2, 1973); *NLRB vs. North Arkansas Electric Cooperative, Inc.*, 446 F. 2d 602 (CA8, 1971).

We will not here undertake a detailed review of the relevant legislative history. Chief Judge Friendly, writing for the Court below, presented an exhaustive review of that history, together with relevant NLRB decisions both prior and subsequent to the principal Congressional enactments of 1947 and 1959. Judge Friendly concluded, at

Bell Aerospace Company vs. NLRB, supra, at p. 494 (Pet., App. A, p. 21):

> "The conclusion we reach from all of the foregoing is this: The 1947 Congress clearly believed that at least some 'managerial employees' other than 'supervisors' were excluded from the protections of the Act. In 1956 the Board concluded that the Congress had meant to exclude all true 'managerial employees.' This exclusion embraced not only an employee 'so closely related to or aligned with management as to place the employee in a position of conflict of interest between his employer on the one hand and his fellow workers on the other' but also one who is 'formulating, deter mining and effectuating his employer's policies or has discretion, independent of an employer's established policy, in the performance of his duties,' Illinois State Journal-Register, Inc. v. NLRB, 412 F.2d 37, 41 (7 Cir. 1969). Both because of what we believe to have been the understanding of the 1947 Congress and because the Board's interpretation of it had been so clearly defined for the 1959 Congress, the Board is not now free to decide the contrary. In this respect we follow the illuminating opinion of Judge Craven, dealing with a confidential secretary, in NLRB v. Wheeling Electric Co., 444 F. 2d 783 (4 Cir. 1971), and the Eighth Circuit's decision in North Arkansas Electric, *supra,* 446 F. 2d 602, although we do not agree with everything said in the latter case."

Since neither the Act itself nor the various Congressional reports published in connection with its amendment in 1947 and 1959 specifically dealt with managerial employees, both the Second and Eighth Circuits gave considerable weight to the NLRB's own decisions interpreting the Congressional amendments and their effect upon coverage for managerial employees. These decisions are totally inconsistent with the Board's newly advanced "conflict of interest test" which would exclude from the coverage of the Act only "managerial employees who are involved with

labor policy." Petitioner's brief, p. 25. Such a narrow test "improperly limits the class of employees not protected by the Act." *NLRB vs. North Arkansas Electric Cooperative, Inc., supra,* p. 610.

Of particular significance among these decisions is *American Locomotive Company,* 92 NLRB No. 22 (1950) in which the Board squarely rejected a union's contention that buyers be placed in a separate unit. The Board, at pp. 117-118, stated:

> "As it appears that the buyers are authorized to make substantial purchases for the Employer, we find that they are representatives of management, and as such may not be accorded bargaining rights under the Act."

The Board was even more explicit in *Swift & Co.,* 115 NLRB No. 105 (1956), a case in which the Board held that procurement drivers, who made purchases for the employer's account, could not be included in the production and maintenance unit and would not constitute an appropriate separate unit. The Board stated:

> "It was the clear intent of Congress to exclude from the coverage of the Act all individuals allied with management. Such individuals cannot be deemed to be employees for the purposes of the Act. Accordingly, we reaffirm the Board's position that representatives of management may not be accorded bargaining rights under the Act and deny the petitioners' alternate request."

The Board now seeks casually to dismiss these decisions, decisions upon which employers have relied for two decades, as "sweeping and inaccurate statement(s)." Petitioner's brief, p. 27. Completely disregarding *American Locomotive Company* and *Swift & Co.,* the Board surprisingly states, at p. 23 of its brief, that, "in the light of . . . the Board's past practice, the Board (in the

instant case) correctly concluded that Congress did not intend to exclude all managerial employees from the coverage of the Act, but rather left it to the Board to determine 'those managerial types who are properly to be excluded,' . . ." In its effort to unilaterally expand coverage under the Act, the Board chooses to ignore its own precedents. Of particular interest is the Board's reference, at page 27 of Petitioner's brief, "to numerous Board decisions immediately after the enactment of the 1947 amendments which held that managerial employees, not presenting a conflict of interest problem, were to be excluded from rank and file bargaining units,[16] but not from the coverage of the Act." The last clause is critical, but there is no citation of authority to support it. This omission should occasion no surprise, for so far as we can ascertain, the question was squarely presented to the Board in only two cases subsequent to 1947, *American Locomotive Company, supra* and *Swift & Co., supra*. In both cases, each involving buyers, the Board flatly held that managerial employees were not covered by the Act.

In fact, the Board is broadly misconstruing its many precedents in this area. *Swift & Co.* is not an "aberration" (Pet. brief, p. 32), but a logical outgrowth of the Board's many decisions in similar cases. *Bell Aerospace Company v. NLRB, supra*, f.n. 16 at p. 497. Contrary to its present assertion, the Board did not exclude managerial employees from bargaining units of other employees solely because they lacked community of interest. Managerial employees were excluded on the ground that they were a part of management. This was especially true in cases involving buyers. The Board repeatedly excluded such employees for the reason that, in committing the employer's credit, buyers were engaged in a function

unique to management and, accordingly, were a part thereof.[1]

These cases belie the Board's present contention that managerial employees, even though excluded from other employee units, are covered by the Act as long as they are not engaged in labor relations. The Board refuses to

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[1] See, for example, *Interstate Company,* 125 NLRB No. 11 (1959) ("In accordance with customary Board policy, we will exclude these employees as managerial employees because of their buying function."); *W. W. Chambers Company,* 124 NLRB No. 135 (1959) ("The buyer spends about 60% of her time in buying supplies for the employer . . . By virtue of her purchasing activities . . . this employee effectively exercises a prerogative of, and is a representative of management. We therefore find that the interests of the buyer are allied with those of managment. Accordingly, we shall exclude her . . ."); *Temco Aircraft Corp.,* 121 NLRB No. 145 (1958) ("Buyer A: This employee purchases materials for the company and is often required to pledge the company's credit. We find that Buyer A is managerial, and exclude him from the unit."); *Federal Telephone and Radio Company,* 120 NLRB No. 207 (1958) (". . . we find that buyers . . . exercise a prerogative of management . . . that their interests are allied with management and exclude them . . ."); *Mack Trucks, Inc.,* 116 NLRB No. 222 (1956) ("We find that the buyers and assistant buyers are managerial employees and shall exclude them."); *Plankinton Packaging Co.,* 116 NLRB No. 160 (1956) (". . . [he] (employee who made purchases for employer's account) exercises a prerogative of, and [is a] representative of management . . . [his] interests are allied with management and [we] exclude [him] from the appropriate units."); *Girdler Company,* 115 NLRB No. 109 (1956) ("We find . . . that the buyers are managerial employees whom we shall exclude . . ."); *Sunnyland Packing Co.,* 113 NLRB No. 12 (1955) (". . . the interests of both these employees [beef buyers] are clearly associated with management. We shall, in accord with our usual practice, exclude them . . ."); *Federal Telecommunication Laboratories, Inc.,* 92 NLRB No. 206 (1951) (". . . in accordance with our established policy, [we shall] exclude them from the unit as managerial employees who have the authority to pledge the company's credit in making purchases."); *Wm. P. McDonald Corp.,* 83 NLRB No. 66 (1949) (". . . his interests are closely connected with those of management. Accordingly, we shall exclude the fruit buyer . . ."); *Denton's Inc.,* 83 NLRB No. 3 (1949) (". . . the interests of the buyers . . . are more closely identified with management than with the other employees . . . in accordance with our policy . . . we shall exclude all buyers . . .").

analyze the rationale of its own decisions. As stated by Chief Justice (then Circuit Judge) Burger in *Retail Clerks International Association vs. NLRB,* 366 F. 2d 642 (CADC, 1966), at p. 645:

> "The Board . . . excludes from the protection of the Act . . . managerial employees . . . The rationale for this Board policy, though unarticulated, seems to be the reasonable belief that Congress intended to exclude from the protection of the Act those who comprised a part of 'management' or were allied with it on the theory that they were the one from whom the workers needed protection."

There is no basis for the Board's novel position that only those involved in the formulation of labor relations policies are to be excluded on this ground. Countless employees are part of management, *i.e.* managerial employees, who have no direct involvement in labor relations matters. This fact is underscored by the many cases involving buyers which are cited in footnote 1. Most significantly, the Circuit Courts have consistently understood the Board's policy in this area to mean that employees allied with management, such as buyers, are *excluded* from the protection of the Act. See, for example, *NLRB vs. International Typographical Union,* 452 F. 2d 976, 979 (CA10, 1971); *Westinghouse Electric Corporation vs. NLRB,* 424 F. 2d 1151, 1158 (CA7, 1970); *Retail Clerks International Association vs. NLRB, supra;* and *International Ladies' Garment Workers' Union vs. NLRB,* 339 F. 2d 116, 123 (CA2, 1964). These decisions, each recognizing that managerial employees are excluded from the coverage of the Act, are consistent with the Board's own decisions on this specific question. *American Locomotive Company, supra; Swift & Co., supra.*

Notwithstanding the numerous court and Board precedents to the contrary, including decisions by two Circuit

Courts which exhaustively reviewed relevant legislative history and found Congress' intent to be otherwise, the NLRB insists that managerial employees are within the coverage of the Labor Management Relations Act. The Board is wrong. The decision of the Second Circuit is well supported by the legislative history of the Act and by numerous Court and Board decisions. It should be affirmed.

POINT II

The National Labor Relations Board must undertake rule-making if it seeks to expand coverage under the Act to buyers such as those employed by Respondent.

Having rejected as erroneous the Board's holding "that it was free to regard *all* managerial employees as covered by the Act unless their duties met the 'fundamental touchstone' of including 'determinations which should be made free of any conflict of interest which could arise if the person involved was a participating of a labor organization' . . .,"[2] the Second Circuit held that the NLRB could find buyers not to be managerial employees only through the promulgation of a rule in accordance with the Administrative Procedure Act.[3] The Second Circuit recognized that buyers like those at Bell had traditionally been classified as managerial employees and stated, at pp. 496-497 of its opinion, that "the argument for rule-making is especially strong when the Board is proposing to reverse a longstanding and oft-repeated policy on which industry and labor have relied."

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[2] *Bell Aerospace Company vs. NLRB, supra,* at pp. 494-495.

[3] 5 U. S. C. Sec. 553.

A. The buyers at Bell Aerospace Company are managerial employees.

The Court below felt that the Board, in a proper proceeding, might find that Bell's buyers are not managerial employees. It insisted, of course, that such a determination could only be made through rule-making. The Court's reasoning was partially predicated upon the fact that the Board, in numerous decisions, had repeatedly found buyers exercising similar responsibilities to be a part of management.

This line of authority, upon which Respondent relied, must be emphasized. The consistency of these decisions underscores the significant departure from established law which the Board seeks to accomplish in an adjudicatory proceeding. The relevant facts are set forth in Respondent's statement of the case. None of these facts are disputed. It can not be seriously maintained that such activity and responsibilities are not managerial. The Bell Buyers, acting in this undisputed capacity, formulate, determine and effectuate the Company's procurement policy. In such capacity, they are clearly allied with management and, as managerial employees, have traditionally been excluded from coverage under the Act.

In a line of decisions unbroken until the instant proceeding, the National Labor Relations Board has uniformly found that buyers who exercise prerogatives of management in the manner and to the degree disclosed by this record are managerial employees. See, for example, *Western Gear Corporation*, 160 NLRB No. 25 (1966), buyers had discretionary authority to pledge the employer's credit up to $5,000 and prepared purchase orders; *ACF Industries, Inc.*, 145 NLRB No. 40 (1963), buyers could commit employer's credit in amounts up to $2500.00 and had authority to reject bids; *International Telephone and Tele-*

graph Corporation, 120 NLRB No. 207 (1958), buyers exercised prerogative of management in making purchases in amounts up to $2500.00 without prior approval; *Girdler Company,* 115 NLRB No. 109 (1956), buyers had final authority to commit employer's credit in amounts up to $2,000; *Mack Trucks, Inc.,* 116 NLRB No. 222 (1956), buyers during a single fiscal year pledged employer's credit in amounts ranging from $800,000.00 to $6,000,000.00, negotiated prices, changed delivery dates and adjusted disputes with suppliers; *Locomotive Firemen and Enginemen,* 145 NLRB No. 143 (1964), clerk annually purchased supplies valued from $60,000 to $100,000 without higher approval; and *Kearney & Trecker Corp.,* 121 NLRB No. 107 (1958), buyers interview prospective suppliers, and cancel orders and place them with alternate vendors. In addition to the foregoing, Buyers have been found by the NLRB to be managerial employees, principally because of their ability to commit the employer's credit, in numerous other decisions.[4]

Under the weight of these authorities and the undisputed facts, there can be no question that Bell's buyers are managerial employees as that term has repeatedly been defined in similar cases. In fact, the Board has conceded as much throughout these proceedings. The Court below, at f.n. 6 on p. 487, was of the opinion that four of the five members of the Board considered Bell's buyers to be managerial employees.

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[4] *Ed's Foodland of Springfield, Inc.,* 159 NLRB No. 119 (1966); *Overton Markets, Inc.,* 142 NLRB No. 71 (1963); *Eastern Camera & Photo Corp.,* 140 NLRB No. 58 (1963); *Root Dry Goods Company, Inc.,* 126 NLRB No. 114 (1960); *Interstate Company,* 125 NLRB No. 11 (1959); *W. W. Chambers Company,* 124 NLRB No. 135 (1959); *Weaver Motors,* 123 NLRB No. 26 (1959); *Temco Aircraft Corp.,* 121 NLRB No. 145 (1958); *Plankinton Packaging Co.,* 116 NLRB No. 160 (1956); *Titeflex Inc.,* 103 NLRB No. 23 (1953); and *Robinson-Schwenn Store,* 83 NLRB No. 3 (1949).

B. The Board must conduct a rule-making proceeding before discarding its numerous precedents which hold that buyers are managerial employees.

The Board is incorrect in its analysis of prior decisions by this Court dealing with rule-making by administrative agencies. The holding of the Second Circuit is consistent with the enunciated principles governing this issue and, in requiring the Board to undertake rule-making,[5] the Court has mandated the only administrative procedure appropriate in these circumstances.

Petitioner chooses to ignore the affirmative thrust of this Court's holding in *SEC vs. Chenery Corporation*, 332 U. S. 194 (1947). At p. 202 of its opinion, the Court stated:

> "Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct within the framework of the Holding Company Act. The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future."

There can be little question that the Court considered rule-making to be the preferable procedure for an agency to utilize in "filling in the interstices of . . . (an) Act." The court did not attempt to precisely delineate those circumstances which required rule-making. It did, however, clearly indicate those instances in which it felt resolution by adjudication to be appropriate. As outlined by the Court, at pp. 202-203:

> "In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the ab-

[5] 5 U. S. C. Sec. 553.

> sence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective."

We suggest that it was the Court's clear intent that where none of the aforementioned alternatives were present, the agency was to proceed by rule-making. In fact, the Court sanctioned adjudication in *Chenery* precisely because the agency was confronted by a novel situation with which it had to deal. *Ibid.*, p. 203.

In the instant case, the circumstances satisfy none of the criteria set down in *Chenery*. The classification of buyers as managerial employees, and their resultant exclusion from coverage under the Act, is not a problem which the NLRB could not reasonably foresee. It is a fundamental issue that has arisen in numerous representation cases. Nor can the Board be heard to say that it lacked sufficient experience with the issue to warrant finalization into a formal rule. As the many Board decisions cited in Point I demonstrate, the NLRB has, on numerous occasions, analyzed the functions of buyers and has consistently found them to be a part of management. Similarly, the problem is not so specialized "as to be impossible of capture into a general rule." In fact, the Board's numerous precedents for more than a quarter of a century have distilled into a rule relied upon by both labor and management—buyers, as managerial employees, are excluded from the coverage of the Act. It is precisely this fact which makes the Board's present, unilateral effort to drastically alter coverage under the Act so inappropriate.

The Board chooses to emphasize those passages in *Chenery* which suggest that "any rigid requirement" regarding rule-making should be avoided and that the choice between proceeding by rule-making or adjudication "lies primarily in the informed discretion of the . . . agency." The Second Circuit, however, is not advancing a rigid requirement. It is holding that in these particular circumstances, which include the Board's rejection of well-established precedents affecting thousands of employees and employers, the Board should comply with the affirmative mandate of *Chenery* and undertake rule-making. Furthermore, we submit that the emphasis in the last quoted clause must be placed on the word "primarily". Its clear implication is that the choice is not exclusively that of the agency, but that the court can and should act where an agency abuses its discretion and insists upon formulating basic rules in complete disregard of the Administrative Procedure Act.

Of particular significance in the instant proceeding, is this Court's decision in *NLRB vs. Wyman-Gordon Co.*, 394 U.S. 759 (1969). The Board, at p. 30 of its brief, totally misconstrues the holding of that case with respect to the NLRB's obligation to undertake rule-making. Although four opinions were written, it is clear that six Justices concurred in the proposition that the NLRB must undertake rule-making when seeking to promulgate a general policy which will have a widespread, prospective effect.

Mr. Justice Fortas, writing for a plurality of four, criticized the NLRB's promulgation by adjudication of a general rule requiring an employer to furnish a list of employees prior to a representation election, and stated, at p. 764:

> "The rule-making provisions of that Act, which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application. . . . They may not be avoided by the process of making rules in the course of adjudicatory proceedings."

Mr. Justice Harlan, in a dissenting opinion, noted that "an agency is not adjudicating when it is making a rule, which the Act defines as 'an agency statement of general or particular applicability and *future affect* . . .' 5 U.S.C. Sec. 551(4)." He went on to conclude, at p. 781:

> "Either the rule-making provisions are to be enforced or they are not. Before the Board may be permitted to adopt a rule that so significantly alters pre-existing labor-management understandings, it must be required to conduct a satisfactory rule-making proceeding, so that it will have the benefit of wide-ranging argument before it enacts its proposed solution to an important problem."

Mr. Justice Black, also dissenting, endorsed Justice Harlan's comments, and went on to say, at pp. 777-779:

> "The rule-making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that is forthcoming. It gives an opportunity for persons affected to be heard. . . .
>
> "Agencies discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice. . . .
>
> "I woud hold the agencies governed by the rule-making procedure strictly to its requirements and not allow them to play fast and loose as the National Labor Relations Board apparently likes to do.[2]" (footnote omitted)

To paraphrase Judge Friendly, if the above excerpts, which reflect the opinion of six Justices that the NLRB must engage in rule-making when promulgating a policy

of general impact, have any meaning, they must require the Board to perform its quasi-legislative function before it can unilaterally decree that thousands of buyers are not managerial employees and, accordingly, are covered by the Labor Management Relations Act. As succinctly put by the court below, at pp. 496-497:

> "The Board was prescribing a new policy, not just with respect to 25 buyers in Wheatfield, N.Y., but in substance, to use Mr. Justice Douglas' phrase, 'to fit all cases at all times.' 394 U.S. at 777, 89 S.Ct. at 1435. There must be tens of thousands of manufacturing, wholesale and retail units which employ buyers, and hundreds of thousands of the latter. Yet the Board did not even attempt to inform industry and labor organizations, by means providing some notice though not in conformity with section 4, of its proposed new policy and to invite comment thereon, as it has sometimes done in the past, see Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L.J. 729, 756-757 (1961) and did in *Excelsior*, 156 N.L.R.B. at 1238, without thereby satisfying the Supreme Court, 394 U.S. at 764, 89 S.Ct. 1426. Although policy making by adjudication often cannot be avoided in unfair labor practice cases, since the parties have already acted and the Board must decide one way or the other, there is no such problem in a representation case.[15] . . . The point rather is that when the Board has so long been committed to a position, it should be particularly sure that it has all available information before adopting another, in a setting where nothing stands in the way of a rule-making proceeding except the Board's congenital disinclination to follow a procedure which, as said in Texaco, Inc. v. FPC, 412 F.2d 740, 744 (3 Cir. 1969), 'enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated,' despite the Court's pointed admonitions.[16]" (footnotes omitted)

In addition to those points so well made by Judge Friendly, there is a pragmatic aspect to this matter which can-

not be ignored. At a time when the NLRB's case load is continuously increasing, with lengthy delays between the filing of a petition and final determination at the agency level, the NLRB could upset an unbroken line of decisions holding buyers to be managerial employees, introduce a new criteria for determining coverage under the Act, and commence an exhaustive case-by-case determination as to which employees are or are not covered.

There is no question that this is the course being charted. In its brief, at p. 32, the Board does not challenge the fact that there "must be tens of thousands of . . . units which employ buyers, and hundreds of thousands of the latter." Rather, it argues that a determination as to whether the hundreds of thousands of buyers are or are not covered by The Act should be made on a case-by-case basis. To quote a noted commentator in this area, the Board's decision in this case is a classic example of "adjudications which do not develop clear criteria but stress doctrinal subtlety and fasten upon fact distinctions, as the Board cases so often do, (and) probably *encourage* litigation."[6]

That the new rule requiring potential conflict will encourage litigation is underscored in the Board's own decision denying Respondent's motion for reconsideration in this case (Pet. App. E, p. 69). In speculating as to the affect of its newly enunciated rule, the Board states, at pp. 73-74:

> "And it may be that other than purely labor relations managerial employees should unquestionably be excluded because of their responsibility with respect to policies which are inextricably intertwined and of necessity affect or impinge upon the labor relations area."

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[6] Bernstein, "The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act," 79 Yale L. J. 571, at p. 594.

and further

"For instance, a corporate representative, charged with the duty of determining where an employers' plants should be located or what capital expenditures a corporation ought to make, may well have such broad managerial discretion as to necessarily involve a determination of matters affecting employment and employment policies that he should be excluded from coverage."

and further

"It may be that his decisions inevitably will encompass the field of labor relations even though corporate organization charts may not on their face classify him as charged directly with labor relations policy making."

and further

"A like analysis might also dictate the exclusion of those bearing primary responsibility for determination of finanical policies, or even those charged with the direction of basic policies in the field of research and development."

and further

"We make no attempt to list in detail all those managerial types who ought properly to be excluded. Nor did we in North Arkansas, where the only relevant consideration was the employee's lack of authority with respect to labor relations matters."

Can there by any question as to the impact of this "doctrinal subtlety" upon the over-crowded calendars of both the NLRB and the Circuit Courts? How are employers, or for that matter unions, to guess as to which employees are or are not covered by the Act?

The Board contends that the number of individuals involved militates against rule-making. To the contrary, the vast impact of this rule demands that rule-making be undertaken. Is the Board seriously contending that it is incapable of developing criteria which would definitively resolve the issue for the vast majority of buyers? If it is, the

NLRB has sadly failed in its purpose. No doubt there will be cases which cannot be disposed of by reference to a general rule. But these will be far fewer than those which will be commenced if there is no rule at all.

Finally, this appears to be an area in which the Board could very much benefit from industry input. The NLRB has failed to consider that portion of the decision in *NLRB vs. North Arkansas Electric Cooperative, supra,* in which the court, after reviewing the stated legislative purpose of the Labor Management Relations Act,[7] reminded the Board that the Act was intended to protect "workers" as opposed to individuals who are clearly aligned with management. That the latter should be excluded only where they are in labor sensitive positions is far too narrow. The Board may well learn that it is in the best interest of both employers and unions to exclude from collective bargaining units those persons, like buyers, who are an admitted part of management.

CONCLUSION

The judgment of the Court below should be affirmed.

Respectfully submitted,

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[7] 29 U. S. C. Sec. 151.

APPENDIX A

Supplementing Appendix A to Petitioner's Brief

Labor Management Relations Act
(29 U. S. C. Sect. 151)

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FINDINGS AND POLICIES

SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Labor Management Relations Act (29 U. S. C. Sect. 151)

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

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Administrative Procedure Act (5 U. S. C. Sect. 551)

§ 551. DEFINITIONS.

• • •

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

• • •